1200 18th STREET NW, SUITE 501 • WASHINGTON DC 20036
PHONE: 202-296-6889 • FAX: 202-296-6895 • WWW.THEUSCONSTITUTION.ORG

December 16, 2013

Honorable Al Franken
309 Hart Senate Office Building
Washington, DC 20510

Dear Senator Franken:

Thank you for your commitment to addressing a long series of rulings by the Supreme Court that have unduly expanded the reach of the Federal Arbitration Act (FAA), and for your work in organizing this important hearing, entitled "The Federal Arbitration Act and Access to Justice." I am writing on behalf of Constitutional Accountability Center (CAC), a public interest law firm, think tank, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history, to offer our thoughts on these recent rulings and to place these rulings within the larger context of the Court's business docket.

Having reviewed the history behind the FAA, CAC shares your conviction that in a series of mostly 5-to-4 rulings, the Supreme Court majority has badly misinterpreted the meaning of the law and the intent of Congress. While CAC has not yet endorsed any specific legislative fixes for these misguided rulings, we believe that it is critical that you and the Senate Judiciary Committee are holding hearings and working on a response to these rulings. In that vein, we are troubled by the statistics produced by Professor Richard Hasen that indicate that Congress has been far less active than in the past at passing legislation that effectively reverses Supreme Court rulings that misinterpret statutes.[1] With a conservative Supreme Court that is actively chipping away at some of the most important progressive statutes enacted by Congress since the New Deal, a responsive Congress is more important now than ever.

I am also writing to share the findings from recent research that we have conducted on the U.S. Chamber of Commerce's success before the Roberts Court. We believe that these findings provide useful background information on the important role that the Chamber has played in shaping the Court's recent business decisions, including those addressing arbitration.

Since 2010, CAC has completed a series of empirical studies on the success rate of the U.S. Chamber of Commerce as an *amicus* participant before the Supreme Court.[2] These studies document a

[1] Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205 (2013). Professor Hasen documents that recent Congresses have been much less active in overriding the Court's statutorily-incorrect decisions than have prior Congresses – with the number of overrides plummeting from 12 during each two-year congressional term from 1975-1990, to 5.8 per term from 1991-2000, and to a mere 2.8 per term from 2001-2012.

[2] *See A Big Term for Big Business*, http://theusconstitution.org/text-history/2094/big-term-big-business; *Not-So-Risky Business: The Chamber of Commerce's Quiet Success Before the Roberts Court – An Early Report for 2012-2013*, http://theusconstitution.org/think-tank/issue-brief/not-so-risky-business-chamber-commerce%E2%80%99s-

sharp increase in the Chamber's success rate before the Court since Chief Justice Roberts and Justice Alito were confirmed. They also show a serious ideological divide in cases with Chamber participation, with the Court's five conservatives – Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas – virtually certain to rule in favor of the Chamber's position in closely decided cases.

Just last Term, the Chamber participated in nearly a quarter of the Court's cases, compiling an impressive record of 14 wins and 3 losses – an 82% winning percentage. All told, since Justice Alito succeeded Justice O'Connor on the Court in 2006, the Chamber has won 71% of its cases overall (76 out of 107), compared with only 43% in the late Burger Court (15 of 35 from 1981-1986) and 56% in the stable Rehnquist Court (45 of 80 from 1994-2005).

Even more striking is the Chamber's success in 5-to-4 or 5-to-3 rulings – cases in which just one defection from the majority could have swung the case against the Chamber. With its undefeated record in these closely decided cases last Term, the Chamber has won 82% of these cases overall (27 of 33) since Justice Alito joined the Court, and the Court's conservatives have sided with the Chamber's position 85% of the time in these controversial cases. This represents a massive pro-business shift, even when compared to the last eleven years of the conservative Rehnquist Court (from 1994 to 2005), which sided with the Chamber's position in 64% of its close cases (9 of 14) and whose conservatives sided with the Chamber's position 68% of the time.

One area of particular success for the Chamber has been the Roberts Court's decisions regarding arbitration. In recent years, the Chamber and its Institute for Legal Reform have helped lead the charge in Congress against the proposed Arbitration Fairness Act. Our research demonstrates that the Chamber has also played a leading role in shaping the Roberts Court's arbitration rulings. Indeed, the Chamber has filed *amicus* briefs in every major arbitration case decided by the Roberts Court, including *American Express v. Italian Colors Restaurant*, *AT&T Mobility LLC v. Concepcion*, and *Rent-A-Center v. Jackson*.

The Chamber has also been on the winning side in the vast majority of these cases. Since Justice Alito joined the Court, the Chamber has compiled a record of 8 wins and 2 losses in its arbitration cases – an 80% winning percentage. Interestingly, 6 of these cases were decided by 5-to-4 or 5-to-3 majorities, with the Chamber winning 5 of them and the Court's conservatives siding with the Chamber's position 90% of the time.

Through its participation and success before the Roberts Court, the Chamber has continued to push the Court to expand the reach of the FAA, often by manipulating the text of this near-century-old law and disregarding its legislative history. Nearly two decades ago, Justice O'Connor correctly described the Court's arbitration jurisprudence as "an edifice of its own creation."[3] Today, as a product

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quiet-success-roberts-court-%E2%80%93-early; *Big Wins for Big Business: Themes and Statistics in the Supreme Court's 2010-2011 Business Cases*, http://theusconstitution.org/think-tank/issue-brief/big-wins-big-business-themes-and-statistics-supreme-courts-2010-2011-business; *Open for Business: Tracking the Chamber of Commerce's Supreme Court Success Rate from the Burger Court Through the Rehnquist Court and Into the Roberts Court*, http://theusconstitution.org/think-tank/issue-brief/open-business-tracking-chamber-commerces-supreme-court-success-rate-burger; *A Tale of Two Courts: Comparing Corporate Rulings by the Roberts and Burger Courts*, http://theusconstitution.org/think-tank/issue-brief/tale-two-courts-comparing-corporate-rulings-roberts-and-burger-courts; *The Roberts Court and Corporations: The Numbers Tell the Story*, http://theusconstitution.org/think-tank/issue-brief/roberts-court-and-corporations-numbers-tell-story.

[3] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

of subsequent arbitration rulings – many of them issued by the Roberts Court at the Chamber's urging – mandatory binding arbitration provisions now pop up, or more often lie hidden in fine print, in just about every conceivable agreement that Americans are obliged to sign, whether to take a job, obtain telephone service, enroll a parent in an assisted living facility, visit a hospital emergency room, purchase a product, or open a bank account; the list goes on and on.

These agreements frequently tilt the arbitration proceedings in a pro-business direction – for instance, by allowing the companies to choose the arbitrator in a given dispute. Other times – as was the case last Term in *American Express* – these agreements include class arbitration waivers, which require ordinary Americans and small businesses to arbitrate their claims individually rather than as a group. From there, each injured party often faces a disturbing choice, described well by Justice Kagan in her *American Express* dissent: "Spend way, way, way more money than your claim is worth," or drop you claim altogether and "relinquish" your legal rights.[4] In turn, Justice Kagan added, the Court has created a "mechanism" that allows businesses "to block the vindication of meritorious . . . claims and insulate wrongdoers from liability."[5]

These are very serious claims that warrant this Committee's full attention. Thank you very much for considering Constitutional Accountability Center's views as part of this process.

Respectfully,

Douglas T. Kendall
President

[4] *American Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting).
[5] *Id.* at 2320.